Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

ROY W. BENJAMIN,

Petitioner,

v.

KATTEN, MUCHIN & ZAVIS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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25 pp

QUESTIONS PRESENTED

I. Whether the Seventh Circuit's affirmation of the District Court's grant of summary judgment conflicts with well settled principles under Fed. R. Civ. P. 56, as set by this Court in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202, and requires the exercise of this Court's certiorari jurisdiction, as recently restated by this Court in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 120 S.Ct. 2097 (2000)?

II. Under Title VII of the Civil Rights Act of 1964, is direct evidence of a discriminatory intent required to avoid summary judgment as a matter of law for the employer?

III. In determining whether to grant summary judgment as a matter of law under Fed. R. Civ. P. 56, should a District Judge weigh the evidence and/or consider only the evidence favoring the movant?

LIST OF PARTIES

The following is a list of all parties to the proceedings in the Court below, as required by Rule 14.1(b) and Rule 29.1 of the Rules of the Supreme Court of the United States.

1. Roy W. Benjamin, Pro Se Petitioner; Plaintiff/Appellant;

2. Katten, Muchin & Zavis, Respondent; Defendant/Appellee;

3. James A. Burns, Jr., Attorney for the Respondent; Defendant/Appellee.

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No. _____

In The
Supreme Court of the United States

OCTOBER TERM, 2001

ROY W. BENJAMIN, *Petitioner,*
v.
KATTEN, MUCHIN & ZAVIS, *Respondent.*

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit is unreported. Only the Westlaw citation is currently available at 2001 WL 505967 (7th Cir.(Ill.))). The Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois, Eastern Division is also unreported. Only the Westlaw citation is currently available at 1999 WL 1212565 (N.D.Ill)). They are attached as appendices.

JURISDICTION

This Count has jurisdiction to review the decision of the United States Court of Appeals for the Seventh Circuit entered on May 11, 2001, by a Writ of Certiorari under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The statutes construed are Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. §2000(e) et seq., which forbids an employer: (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race...; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, ... sex, or national origin. 42 U.S.C. § 2000e-2(a); the Fair Labor Standards Act of 1938, as amended, by the Equal Pay Act of 1963, 29 U.S.C. §§ 206(d), 216(b) and 260, which prohibits differences in pay between men and women employed in the same establishment performing equal work in jobs that require equal skill, effort, and responsibility and that are performed under similar working conditions; and the Civil Rights Act of 1866, as amended in 1991, 42 U.S.C. § 1981 et seq., which provides that all persons "shall have the same right ... and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens....". The 1991 amendment provided for a jury trial and compensatory and punitive damages.

STATEMENT OF THE CASE

Petitioner, Roy W. Benjamin, an African American and former employee of Katten Muchin & Zavis (KMZ), initiated this action by filing a timely charge of gender and racial discrimination with the

Illinois Department of Human Rights and the Equal Employment Opportunity Commission ("EEOC") on November 27, 1991. The EEOC was experiencing a two-and-a-half year backlog in investigating its cases and issued a right-to-sue letter on June 5, 1995. On September 5, 1995, Benjamin filed his original Complaint in Federal Court. The Defendants filed a Motion for Partial Judgment on the Pleadings to strike Plaintiff's jury demand and prayer for compensatory and punitive damages. The motion was granted on February 10, 1997 and Benjamin was granted leave to amend his Complaint with specificity and explain why allegations of discriminatory conduct after the enactment of the 1991 Act were not included in his EEOC charge. (Cited as: 1997 WL 106143 (N.D.Ill.)). Benjamin filed an Amended Complaint on June 6, 1997, which added Counts III through XIV. The Defendant filed 12(b)(6) Motion to Dismiss the Amended Complaint. On January 12, 1998, the Court granted in part and denied in part Defendant's 12(b)(6) Motion to Dismiss the Amended Complaint, dismissing Counts III through VI and IX through XIV. Counts VII and VIII of the Amended Complaint alleged retaliation on the basis of race and gender in violation of § 704(a) of Title VII. The Court dismissed from Counts VII and VIII the two instances of retaliation which occurred before the filing of Benjamin's charge. (Cited as: 1998 WL 25757 (N.D.Ill.)). Benjamin was granted leave to file a Second-Amended Complaint which was filed on February 27, 1998, alleging race- and gender-based discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*; the Fair Labor Standards Act of 1939, 29 U.S.C. § 201 et seq.; and the Civil Rights Act of 1866, 42 U.S.C. § 1981. KMZ denied Benjamin's allegations, claiming he was

terminated for poor performance. The United States District Court entered Summary Judgment in favor of KMZ on December 14,1999. (Cited as: 1999 WL 1212565 (N.D.Ill.)). Benjamin filed a Motion to Reconsider Pursuant to Rule 59(e) of the Fed. R. Civ. P. on December 27, 1999, which was granted in part on January 13, 2000. Benjamin filed a timely Notice of Appeal on February 10, 2000. Oral Argument was held on April 25, 2001 and the United States Court of Appeals for the Seventh Circuit affirmed the judgment of the district court on May 11, 2001, holding that Respondent was entitled to judgment as a matter of law under Fed. R. Civ. P. 56 because Petitioner was terminated for poor performance and failed to produce any direct evidence sufficient to show pretext that he was meeting the employers legitimate expectations. (Cited as: 2001 WL 505967 (7th Cir. (Ill.))). Benjamin herewith files his Petition for Writ of Certiorari on today, August 9, 2001.

(RELEVANT FACTS)

Petitioner, Roy W. Benjamin, initially worked for Respondent, Katten, Muchin & Zavis in May of 1990 as a paralegal for two weeks through a temporary placement agency. During that assignment, Benjamin met KMZ's Docket Department Manager, Edward B. Shealy, also an African-American man, who after being introduced to Benjamin invited him to lunch in an effort to actively recruit Benjamin to work for KMZ as a Paralegal in Docket. Shealy asked Benjamin if they could keep in touch should a position become available in his department. (12(N) 3(b), ¶¶ 3-6, 10, 12, 26-28 and 34-35; Pltf. Exh. A, Benjamin Dep. pgs 23-29; Pltf. Exh. B, Shealy Dep. pgs. 12-15 and 37-38; Pltf. Exh. F,

Benjamin Aff., ¶¶ 9-12; Pltf. Exh. K, Doc. Nos. 0240A-0281A). Benjamin became permanently employed on October 8, 1990, and believed, as told by Shealy, hired as a paralegal in docket (Pltf. Exh A, Benjamin Dep. pgs. 21-32; 12(N) 3(b) Statement, ¶¶ 4-6).

Respondent claimed Benjamin was hired as a docket clerk in its docket department and was never offered a Paralegal position. USCA Order p. 1 ¶2.

In rebuttal, Benjamin produced evidence that he was classified as a paralegal. (12(N) 3(a), ¶¶ 7-11; 12(N) 3(b), ¶¶ 5-7, 9-12 and 16-19; Benjamin Brf. p. 31-32; Benjamin R. Brf. pgs. 6 and 18-20).

The USCA in its Order stated that, "... negative performance report he received occurred only three weeks following his meeting with the personnel director to discuss his raise. As the district court correctly concluded, however, Benjamin's retaliation claim fails because he cannot prove that he engaged in statutorily protected activity." USCA Order p. 6 ¶2.

Benjamin met with the director of personnel on April 30, 1991, to discuss his hiring, disappointment with the salary increase and not being reviewed. Three weeks later, and after he had received a 6.6% increase (higher than what the majority had received), he was threatened with an exit interview as evidenced by the memo. (Benjamin Brf. pgs. 20-30). Title VII forbids the treatment that Benjamin received after his meeting with Mr. Villa. (Benjamin Brf. pgs. 12-15 and 24-25; Benjamin R. Brf. pgs. 15-18). This series of events create discriminatory motive and is probative because a reasonable fact-finder and the district court should have taken all the evidence

before the court and drawn inferences from that evidence in Benjamin's favor. (Benjamin Brf. pgs. 11-17 and 20-30; Benjamin R. Brf. pgs. 4, 6, 11-12, 15-18.)

Benjamin has shown much more than an inference of discriminatory motive and a causal link between his request to be reviewed for a pay raise and the memos that were generated, only after his inquiry, between January and March of 1991, in order to determine the amount of his increase in April of 1991. He has also shown an inference of retaliation and a link between his April 30, 1991, meeting with the Director of Personnel and the negative reports occurring only three weeks after that meeting as evidenced by the May 21, 1991 memo. Benjamin's status changed immediately from having no reports of dissatisfaction from his Supervisor to the Director of Personnel and receiving a 6.6 percent increase, to being threatened with an exit interview. Finally, Plaintiff has through a preponderance of the evidence rebutted Defendant's proffered legitimate reason's for his discharge, simply, because there were no documented incidents of alleged poor performance between May 21, 1991 and September 23, 1991.

The Defendant cannot show, as evidenced by Benjamin's time sheets, any support to the alleged 75% tardiness, before or after the July 15, 1991 warning. Benjamin did not violate the 30-day probationary period for tardiness ending on August 15, 1991. The Defendant cannot point to any alleged failures to complete assignments, name any attorney or secretary that Benjamin allegedly had problems with, any alleged refusals to follow procedures, nor any unauthorized over-time. The most significant facts are, that both, Shealy stated during his

deposition that he was not aware of any alleged problems of performance after Benjamin was moved into the actual Docket department in July, and Martin stated during her deposition that she had no intentions of discussing Benjamin during their luncheon on September 23, 1991. Furthermore, Shealy stated during his deposition that most of the memos' concerns were not actual problems, but could have been problems if they had persisted.

Benjamin's time sheets, monthly progress and billing reports, refute all of the September 23, 1991 memos' charges because they show each and every duty or task performed by Benjamin during his employment and they were all completed in an efficient manner. (Benjamin Brf. pgs. 13-16 and 25-30).

Plaintiff has also shown Defendant continued its retaliatory conduct against him by terminating him "with no rehire status," thus, denying him an equal opportunity to be hired as a true Paralegal, and by reporting to Illinois' Department of Employment Security ("IDES") that he had committed misconduct with his work, thereby, denying his unemployment insurance for 8 months, depriving him of financial support until the Board of Review ruled against KMZ. *See, Katten, Muchin and Zavis v. Dept. Of Employment Security, et al.*, 279 Ill.App.3d 794, 665 N.E.2d 503, 216 Ill. Dec. 443 (1996). Defendant terminated Benjamin two weeks prior to his being eligible for profit sharing to further deprive him of any future financial gain. (Benjamin Brf. pgs. 21-26).

The United States Court of Appeals for the Seventh Circuit also stated Benjamin "cannot invoke the continuing violation theory, and his § 1981 claim

is untimely. USCA Order p. 8. No consideration is given to the fact that the EEOC was experiencing a two-and-a-half year backlog in investigating its cases and Benjamin's charge was not assigned to an investigator until mid-1994 and a fact-finding conference conducted in July 1994. The right-to-sue letter was received on June 5, 1995. (Benjamin Brf. p. 3; Benjamin R. Brf. pgs. 3-5 and 7-18).

The continuing violation doctrine allows a plaintiff to base a claim on a time-barred act by linking the time-barred act with an act that is within the limitations period. *See Miller v. American Family Mut. Ins. Co.*, 203 F.3d 997, 1003-04 (7th Cir. 2000). The plaintiff must show that the alleged acts of discrimination were part of an ongoing pattern of discrimination and that at least one of the alleged acts of discrimination occurred within the limitations period. *Young v. Will County Dep't of Pub. Aid*, 882 F.2d 290, 292 (7th Cir. 1989).

In requiring Benjamin to prove he engaged in statutorily protected activity, stating he failed to produce any evidence that KMZ actually gave negative references to potential employers, relying upon *post hoc ergo propter hoc* memos produced by the movant, as evidence of poor performance, and affirming a Rule 56 motion in favor of KMZ, the United States Court of Appeals for the Seventh Circuit has diverged from the standards of other circuits, the Seventh Circuit's own standards and the pronouncements of this Court for review of cases involving summary judgment. (Benjamin R. Brf. p. 3).

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT CERTIORARI SINCE SEVERAL CIRCUITS, INCLUDING THE SEVENTH, INDICATE APPREHENSION ABOUT SUMMARY JUDGMENT IN EMPLOYMENT DISCRIMINATION CASES.

Regarding the evidence necessary to create a factual issue under Title VII of the Civil Rights Act of 1964, this Court has stated: "...[R]ejection of defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, '[n]o additional proof of discrimination is required.' " *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (Emphasis added).

Some circuits hold the above language from *Hicks* to mean that proof of a prima facie case coupled with proof of pretext is always sufficient to present a jury question. Other circuits disagree, and require direct evidence of discriminatory intent.

The Seventh and Fourth Circuits have indicated their apprehension about summary judgment in employment discrimination cases. The main reason behind their reluctance is the necessary intent analysis that goes along with most employment discrimination cases. Such cases often turn on issues of motive or intent making them unlikely candidates for summary judgment. *Sarsha v. Sears, Roebuck & Co.*, 3 F.3d 1035 (7th Cir. 1993).

The Eight Circuit has repeatedly reaffirmed that "summary judgment should seldom be used in employment discrimination cases. *Crawford v. Runyon*, 37 F.3d 1338, 1341 (8th Cir.1994). The court explained, "[b]ecause discrimination cases often depend on inferences rather than on direct evidence, summary judgment should not be granted unless the evidence could not support any reasonable inference for the non-movant." The courts have suggested that employment discrimination cases involve a highly fact-specific inquiry and therefore do not lend themselves to decision on summary judgment. *Beardsley v. Webb*, 30 F.3d 524 (4th *Cir.* 1994). The Fourth Circuit concluded that, "the nature of these claims, often involving widely conflicting accounts of the alleged incidents, necessitates credibility determinations that are improper on a motion for summary judgment.

The Seventh Circuit has held that the elements of a prima facie case, plus evidence of pretext, are sufficient to create a jury issue. *See Anderson v. Baxter Health Care Corp.*, 13 F.3d 1120, 1122-23 (7th Cir. 1994) (stating that a fact-finder may find in the plaintiff's favor when a prima facie case of discrimination is established and plaintiff shows the falsity of the employer's proffered reasons); *Courtney v. Biosound, Inc.*, 42 F.3d 414, 418 (7th Cir. 1994) (stating that plaintiff will defeat a motion for summary judgment by producing evidence from which a jury could infer the company's proffered reasons were pretextual).

The issue of pretext has been discussed by legal commentators. *See* Catherine J. Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the*

Pretext-Plus Rule in Employment Discrimination Cases, 43 Hastings L.J. 57 (1991).

This Court in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 140, 120 S.Ct. 2097, 2104, granted certiorari to resolve a conflict among the Courts of Appeals as to whether a plaintiff's prima facie case of discrimination (as defined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)), combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision, is adequate to sustain a finding of liability for intentional discrimination. Compare *Kline v. TVA*, 128 F.3d 337 (C.A. 6 1997) (prima facie case combined with sufficient evidence to disbelieve employer's explanation always creates jury issue of whether employer intentionally discriminated). *Combs v. Plantation Patterns*, **2105 106 F.3d 1519 (C.A. 11 1997) (same), cert. denied, 522 U.S. 1045, 118 S.Ct. 685, 139 L.Ed.2d 632 (1998); *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061 (C.A. 3 1996) (same) (en banc), cert. denied, 521 U.S. 1129, 117 S.Ct. 2532, 138 L.Ed.2d 1031 (1997); *Gaworski v. ITT Commercial Finance Corp.*, 17 F.3d 1104 (C.A. 8)(same), cert. denied, 513 U.S. 946, 115 S.Ct. 355, 130 L.Ed.2d 310 (1994); *Anderson v. Baxter Health Care Corp.*, 13 F.3d 1120 (C.A. 7 1994) (same); *Washington v. Garrett*, 10 F.3d 1421 (C.A. 9 1993) (same), with *Aka v. Washington Hospital Center*, 156 F.3d 1284 (C.A.D.C. 1998) (en banc) (plaintiff's discrediting of employer's explanation is entitled to considerable weight, such that plaintiff should not be routinely required to submit evidence over and above proof of pretext), and with *Fisher v. Vassar College*, 114 F.3d 1332 (C.A. 2 1997) (en banc) (plaintiff must introduce sufficient evidence for jury to find both that

employer's reason was false and that real reason was discrimination), cert. denied, 522 U.S. 1075, 118 S.Ct. 851, 139 L.Ed.2d 752 (1998); *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (C.A. 5 1996)(same); *Theard v. Glaxo, Inc.*, 47 F.3d *141 676 (C.A. 4 1995)(same); *Woods v. Friction Materials, Inc.*, 30 F.3d 255 (C.A. 1 1994)(same).

This Court should also review this case since the approach of the Seventh Circuit is inconsistent with the guiding principles of the indirect evidence method of proof mandated by this Court in *McDonnell Douglas, supra,* at 804-805 and followed in *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 256 (1981), and *Hicks,* 509 U.S. at 502 (1993). The theory underlying *McDonnell Douglas* and its progeny is that an employer in an employment discrimination case will not ordinarily admit employment discrimination. And this Court adopted the indirect burden-shifting method of proof, because of the unavailability of direct evidence. Requiring direct evidence cannot be reconciled with *McDonnell Douglas* and its progeny, which hold that direct evidence is not required.

III. CERTIORARI SHOULD BE GRANTED SINCE THE STANDARD FOR REVIEW OF A GRANT OF SUMMARY JUDGMENT IS *DE NOVO* AND DOES NOT REQUIRE THAT A PLAINTIFF'S CASE BE PROVEN AT THIS PHASE.

The standard of review by the appellate court of the grant of a motion for summary judgment is *de novo.* Review, based upon the record before the court, is whether the district court erred in granting Katten, Muchin & Zavis' motion. In ascertaining whether

summary judgment is appropriate, the court must view the evidence, and draw all reasonable inferences therefrom, in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,247-48, 106 S.Ct. 2505,2510, 91 L.Ed.2d. 202 (1986); *Kennedy v. United States*, 965 F.2d 413, 417 (7th Cir. 1992); *Chavez v. Cady*, 207 F.3d 901, 902 (7th Cir. 2000).

In the case of *Williams v. Bristol-Myers*, 85 F.3d 270 (7th Cir. 1996) the court refused to grant summary judgment to an employer in an age discrimination case based on a claim of falsification of records. The court pointed out that the claim of falsification made by the employer was not supported by the code it claimed the employee violated. As the court also pointed out, such a strained attempt at justifying termination was not only *not* evidence of a legitimate business justification for termination, it was evidence of pretext.

III. CERTIORARI SHOULD BE GRANTED SINCE THE SEVENTH CIRCUIT'S WEIGHING OF EVIDENCE IS INCONSISTENT WITH THE STANDARDS IN OTHER CIRCUITS WHICH CONSIDER EVIDENCE FAVORING THE NON-MOVANT AND SINCE THIS APPROACH FAILS TO TAKE INTO ACCOUNT THIS COURT'S STANDARDS FOR JUDGMENT AS A MATTER OF LAW UNDER RULES 52 AND 56.

In affirming the district court's entry of judgment in favor of KMZ, the Seventh Circuit's opinion incorrectly applied established Fed. R. Civ. P. 52 and 56 principles, in its divergent approach to reviewing the facts in this case.

The summary judgment standard is "applied with added rigor in employment discrimination cases, where intent and credibility are crucial issues." *Sharsha v. Sears, Roebuck & Co.*, 3 F.3d 1035, 1038 (7th Cir. 1993). The district court in making its determination, should have drawn every reasonable inference from the record in the light most favorable to the non-moving party and should not have made credibility determinations or weighed evidence. *Associated Milk Producers, Inc. v. Meadow Gold Diaries, Inc.*, 27 F.3d 268, 270 (7th Cir. 1994). The court of appeals considers questions of fact as well as questions of law. It does not, however, substitute its judgment for the verdict of a jury, or the findings of a trial judge or an administrative agency; the scope of its factual review is limited to determining whether or not there is sufficient evidence to support the verdict or finding.

When the court reviews cases tried by a judge without a jury, it accords respect to the trial judge's superior opportunity to evaluate witness credibility, and ordinarily limits its review to inferences and legal decisions which have been made. While questions of law are reviewed *de novo*, factual questions are reviewed deferentially and will not be reversed on the facts unless the court concludes that the findings of the district judge are "clearly erroneous." Fed. R. Civ. P. 52(a). Mixed questions of law and fact, where the legal conclusions are based on the application of a legal rule or standard to the facts of the case, are reviewed deferentially for clear error. *See United States v. Spears*, 965 F.2d 262, 270-71 (7th Cir. 1992).

The standard enunciated by this court is that "[s]ummary judgment is proper "if the pleadings,

depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party seeking judgment carries the initial burden of demonstrating an absence of evidence to support the position of the non-moving party. *Doe v. R.R. Donnelley & Sons Co.*, 42 F.3d 439, 443 (7th Cir. 1994).

Correctly applying the principles of Rule 56(c) provide that to prevail on summary judgment "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, [must] show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Though all reasonable inferences are drawn in favor of the party opposing the motion, *United States E.E.O.C. v. Clayton Resident Home, Inc.*, 874 F.Supp. 212, 214-215 (N.D. Ill. 1995), citing *Beraha v. Baxter Health Care Corp.*, 956 F.2d 1436, 1440 (7th Cir. 1992), a scintilla of evidence in support of non-movant's position will not suffice to oppose summary judgment. *Brownell v. Figel*, 950 F.2d 1285, 1289 (7th Cir. 1991). Instead, the non-moving party must elucidate specific facts demonstrating that there is a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1355, 89 L.Ed.2d 538 (1986). Consequently, motions for summary judgment must be analyzed in light of both the applicable substantive law and the question of whether a reasonable jury could return a verdict in the non-movant's favor. *Checkers, Simon, & Rosner v. Lurie Corp.*, 864 F.2d 1338, 1344 (7th Cir. 1988). Moreover, to preclude summary judgment the disputed facts must be those that might affect the

outcome of the suit, *First Indiana Bank v. Baker*, 957 F.2d 506, 508 (7th Cir. 1992), and a dispute about a material fact is "genuine" only if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson*, 477 U.S. at 247-48. "One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims and defenses..." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). As such, a non-moving part is required to go beyond the pleadings with affidavits, depositions, answers to interrogatories, and admissions on file to designate specific facts showing a genuine issue for trial. *Bank Leumi Le-Israel, B.M. v. Lee*, 928 F.2d 232, 236 (7th Cir. 1991). Plaintiff must show a genuine issue for trial and prove by a preponderance of that evidence that the employer's proffered reason was a pretext. *Oxman v. WLS-TV*, 846 F.2d 448, 453 (7th Cir. 1988).

CONCLUSION

This case presents important questions concerning the correct application of the guiding principles in Fed. R. Civ. P. 52 and 56, to insure the appropriate standard of review for judgment as a matter of law in employment discrimination cases. The courts of appeals continue to take a divergent approach by making credibility determinations and weighing evidence on summary judgment, therefore, review by this Court is warranted.

Respectfully submitted,

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